Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 30, 1993

Mr. William J. Delmore, III
General Counsel
Office of the District Attorney
Harris County
201 Fannin, Suite 200
Houston, Texas 77002-1901

OR93-399

Dear Mr. Delmore:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. art. 6252-17a. Your request was assigned ID# 20045.

The Harris County District Attorney's Office ("your office") received an open records request for "any and all information related to a homicide occurring on September 12, 1991." You first contend that your office is a branch of the judiciary and thus is not subject to the Open Records Act. *See* V.T.C.S. art. 6252-17a, § 2(1)(H). Although this office has generally dismissed your argument in prior decisions, *see, e.g.*, Open Records Letter OR93-334 (1993), we note that when the district attorney, acting as an agent of the grand jury, gathers information on behalf of the grand jury, the information is deemed to be in the constructive possession of the grand jury despite the fact that the information is in the actual possession of the district attorney. Open Records Decision No. 411 (1984). Among the documents you submitted to this office are records that your office clearly holds as an agent of the grand jury. Accordingly, your office may withhold the "Grand Jury Appearance Witness Warning Forms" as records not subject to the Open Records Act. However, the remaining records at issue are subject to the act and may be withheld only if they come under the protection of one of the act's exceptions to required public disclosure.

You contend the requested information comes under the protection of sections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act. To secure the protection of section 3(a)(3), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision Nos. 588 (1991); 452 (1986). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision Nos. 437 (1986); 331, 328 (1982). To demonstrate that litigation is

reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You inform us that the only suspect in the homicide investigation has been no-billed by the Harris County Grand Jury and "[t]here is no present intention to present the matter to another grand jury." Consequently, you have not met your burden in demonstrating the applicability of section 3(a)(3).[1]

Section 3(a)(8) excepts records the release of which would "unduly interfere" with law enforcement or prosecution. Open Records Decision Nos. 434 (1986); 287 (1981). You have not argued, nor is it apparent to this office, that the release of the requested information, which, judging from your arguments, pertains to a closed police investigation, would in any way hamper law enforcement or crime prevention interests. We therefore have no basis for determining the applicability of this exception.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

The right of privacy, however, is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.). Therefore, the homicide victim in question has no such right. On the other hand, small portions of the records at issue implicate the privacy interests of living persons. *See* Open Records Decision No. 470 (1987) (evidence of severe emotional stress is protected by common-law privacy). We have marked the information that your office must withhold on privacy grounds.

Because section 3(a)(1) also protects information deemed confidential by statutory law, your office must withhold all hospital and EMS records unless the requestor presents proper authorization for the release of these records. *See* V.T.C.S. art. 4495b, § 5.08(b); Health & Safety Code §§ 773.092(e)(4), 773.093(a). *See also* Open Records Decision No. 598 (1991). Your office must release, however, all remaining documents in your files.

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[1]Your contention that the requested information constitutes attorney work product has been rejected in prior decisions to your office. *See, e.g.*, Open Records Letter OR93-330 (1993). Accordingly, your arguments need not be further discussed here.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

James B. Pinson

James B. Pinson
Assistant Attorney General
Opinion Committee

JBP/RWP/jmn

Ref.: ID# 20045

Enclosures: Marked documents

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